IN THE

Supreme Court of the United States

OCTOBER TERM, 1975
NO. 75-7081

STANLEY MARKS, HARRY MOHNEY, GUY WEIR, AMERICAN AMUSEMENT CO., INC., and AMERICAN NEWS CO., INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases

Page

Other

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Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on July 30, 1975.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 520 F.2d 913 (CA 6 1975) and is set forth in Appendix A hereto.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 30, 1975. An application for rehearing was timely filed and denied on September 15, 1975. On October 6, 1975, Mr. Justice Stewart granted an extension of time to and including November 14, 1975, within which to file this Petition. This Court's jurisdiction is invoked under *Title 28 United States Code §1254(1).*

QUESTIONS PRESENTED

1. Whether defendants in obscenity prosecutions which are founded upon conduct occurring prior to this Court's decisions in *Miller v. California* and its companion cases are entitled to jury instructions founded upon the *Roth-Memoirs* obscenity formulation prevailing at the time of their conduct?

2. Whether an appellate court, in performing its duty enunciated in *Jacobellis v. Ohio,* 378 U.S. 184 (1964), of independently determining the issue of obscenity, must itself view the materials charged as obscene?

3. Whether a jury may be instructed to determine the issue of obscenity on the basis of community standards based upon a community comprised of the precise geographical boundaries of a federal judicial district when all of the jurors are both drawn from and constantly exposed to the influences of other communities?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fifth Amendments to the United States Constitution are set forth in Appendix B hereto.

STATEMENT

The Petitioners, three individuals and two corporations, were charged in the Eastern District of Kentucky in a nine-count indictment alleging a single count of conspiracy in violation of *Title 18 United States Code §371* and eight substantive counts of interstate transportation of obscene films for the purpose of sale and distribution in violation of *Title 18 United States Code §1465.*

Each of the substantive counts in the indictment related to a separate allegedly obscene film exhibited at the Cinema X Theatre in Newport, Kentucky. The indictment charged that each of said films had been transported in interstate commerce for the purpose of exhibition at the Cinema X Theatre. The conspiracy count was founded upon an alleged agreement among the Petitioners to cause the instances of interstate transportation upon which the substantive counts were predicated.

After a trial by jury, all of the Petitioners were acquitted of one substantive count, and all were convicted on the conspiracy count. All of the Petitioners except American News Co., Inc. were also convicted on the remaining substantive counts.

All of the conduct which formed the basis for the substantive counts of the indictment occurred between January 15,

1973, and February 27, 1973. The conspiracy count was predicated upon an alleged agreement beginning August 1, 1970, and continuing through February 27, 1973. Thus the latest date pertinent to any of the conduct charged against the Petitioners was February 27, 1973. This was several months prior to the announcement by this Court, on June 21, 1973, of new constitutional guidelines in the area of obscenity regulation. See *Miller v. California,* 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973); *Kaplan v. California,* 413 U.S. 115 (1973); *United States v. 12 200-Foot Reels of Film,* 413 U.S. 123 (1973); *United States v. Orito,* 413 U.S. 139 (1973).

The case came to be heard by a jury trial commencing October 9, 1973. Because the conduct for which Petitioners were prosecuted occurred prior to this Court's formulation of the obscenity standards enunciated in *Miller* and its companion cases, the Petitioners requested the Court to instruct the jury on the "*Roth-Memoirs*" obscenity formulation set forth in *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) and *Roth v. United States,* 354 U.S. 476 (1957). The Court refused the request and, over objection, instructed the jury upon the basis of the "*Miller*" obscenity formulation.

The jury was further instructed that the obscenity of the films was to be judged by the application of local community standards. They were instructed, over the objections of the Petitioners, that the community from which those standards were to be drawn was that comprised of the Eastern District of Kentucky. Petitioners objected to this charge on the ground that the subject films were exhibited at the Cinema X Theatre located in what is essentially a single major metropolitan area

comprised of the adjacent cities of Newport, Kentucky, and Cincinnati, Ohio.

After conviction in the United States District Court for the Eastern District of Kentucky, all of the Petitioners herein appealed. Upon appeal, the United States Court of Appeals for the Sixth Circuit affirmed the judgments of conviction in a split decision with the Circuit Judge McCree dissenting. A Petition for Rehearing was timely filed and denied in a further split decision with Judge McCree once again in dissent.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES COURTS OF APPEAL FOR THE FIRST, FIFTH, NINTH AND DISTRICT OF COLUMBIA CIRCUITS ON THE ISSUE OF WHETHER, IN OBSCENITY PROSECUTIONS BASED UPON CONDUCT OCCURRING PRIOR TO *MILLER v. CALIFORNIA,* DEFENDANTS ARE ENTITLED TO JURY INSTRUCTIONS BASED UPON THE *ROTH-MEMOIRS* OBSCENITY STANDARD PREVAILING AT THE TIME OF THE CONDUCT.

The conduct upon which the prosecutions below were based all occurred at least several months prior to the announcement by this Court, on June 21, 1973, of new constitutional guidelines in the area of obscenity regulation. *Miller v. California,* 413 U.S. 15 (1973) and its companion cases. The conduct with which Petitioners were charged thus occurred

when the prevailing obscenity formulation was one commonly referred to as the "*Roth-Memoirs*" standard. *Memoirs v. Massachusetts,* 383 U.S. 413 (1966); *Roth v. United States,* 354 U.S. 476 (1957).

Since the trial below occurred subsequent to the annoucement of new guidelines in *Miller, supra,* the District Court was faced with the question of whether the jury should be instructed on the *Miller* guidelines or on the *Roth-Memoirs* guidelines which prevailed at the time of the conduct charged. Over Petitioners' objections, the District Court chose to instruct the jury on the newer obscenity standards set forth in *Miller.*

The propriety of such a course of action has been expressly addressed by United States Courts of Appeal for the First, Fifth, Ninth, and District of Columbia Circuits. All of those Courts found such jury instructions, in the circumstances presented here, to constitute a denial of due process. The Sixth Circuit Court of Appeals in this case acknowledged such holdings in other Circuits and, in a split decision, expressly declined to follow them. In dissent, Judge McCree voiced agreement with the prior decisions of the other Circuit Courts.

The issue of applying the *Miller* standard retroactively to conduct which occurred prior to the announcement of the *Miller* decision was addressed by the Fifth Circuit Court of Appeals in *United States v. Thevis,* 484 F.2d 1149 (CA 5 1973). The trial in *Thevis* had occurred prior to the *Miller* decision and the jury instructions there were thus based upon the *Roth-Memoirs* obscenity formulation. In reviewing the convictions after the *Miller* decision, the Court of Appeals took the *Miller* formulation into account. Since the conduct with which Thevis

was charged occurred while the *Roth-Memoirs* standard prevailed, however, the Fifth Circuit held that he could not be convicted for any material which did not meet the *Roth-Memoirs* obscenity standard:

> "However, we do believe it to be our duty, under the *Miller* remands and in view of the care with which the judiciary must protect First Amendment rights, to assure that no one is convicted under the earlier extant standards if they are more restrictive of pornography than those in *Miller.* Thus when we make, as we are required to do , an 'independent constitutional judgment on the facts of the case as to whether the material is constitutionally protected,' Jacobellis v. Ohio, 1964, 378 U.S. 184, 190, 84 S.Ct. 1676, 12 L.Ed.2d 793; United States v. Groner, 5 Cir., 1973, supra, we shall consider both the *Miller* and *Memoirs* definitions of obscenity. Any count based on a magazine which is not obscene under both of these standards is due to be dismissed.
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> * * * * *
>
> "Since we have ruled that appellants are to receive any protection provided by either applicable standard, their convictions on the six counts based on magazines we find to be protected by *Memoirs* must be reversed. The judgment of conviction as to the other six counts is affirmed." 484 F.2d, at 1155-1157.

The Fifth Circuit decision in *Thevis* was later cited and followed by the First Circuit in *United States v. Palladino,* 490 F.2d 499 (CA 1 1974):

> "The defendants are caught in a period of transition, their prosecutions having taken place before the

Miller decisions. They cannot fairly be subjected to penalties for violation of rules established after their actions. On the other hand, the remand of the entire group of pending obscenity prosecutions suggests to that the extent that *Miller* creates protections not afforded by prior standards, these cannot be denied to persons whose prosecutions have not terminated. Therefore with due regard for First Amendment rights we adopt the position that on remand the material allegedly in violation of 18 U.S.C. §1461 must be found to be obscene under both the *Miller* and the *Roth-Memoirs* standards or the defendants must be acquitted. *See* United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973)." 490 F.2d, at 500-501.

The decision not to apply the *Miller* standards retroactively was adopted over the dissent of Circuit Judge Aldrich who stated:

"With all respect, I do not find the Fifth Circuit's decision in United States v. Thevis persuasive." 490 F.2d, at 504.

Unlike the instant case, *Thevis* and *Palladino* involved situations in which both the conduct charged and the trials occurred prior to the *Miller* decision. The precise fact situation here presented – a post-*Miller* trial founded upon pre-*Miller* conduct – was before the Ninth Circuit in *United States v. Jacobs*, 513 F.2d 564 (CA 9 1975):

"Appellant John Andrew Jacobs was indicted, tried and convicted for violation of 18 U.S.C. §1462 (knowingly receiving an obscene film transported in interstate commerce) after June 23, 1973, the date

on which the Supreme Court rendered the decision in *Miller*. The date of the alleged offense, however, was May 10, 1973, before *Miller* was decided." 513 F.2d, at 565.

As in the instant case, the jury in *Jacobs* was instructed on the basis of the *Miller* obscenity standards. The Ninth Circuit reversed the conviction in *Jacobs*, finding that such instructions constituted a due process violation equivalent in effect to an *ex post facto* law:

"The jury which convicted appellant was instructed using the definition of 'obscenity' enunciated in *Miller*, rather than the *Roth-Memoirs* definition which preceded it. Appellant argues that the *Miller* definition expanded the area of unprotected speech which is now made subject to criminal sanction under §1462, and that retroactive application of such expanded standards to his conduct was effectively the application of *ex post facto* law, violating his due process right to notice of the conduct proscribed. As we agree that the *Roth-Memoirs* gloss on 'obscenity' did not give appellant adequate notice that his conduct would be judged by the expanded standard ultimately applied, we reverse his conviction." *Id.*, at 565.

The Court went on to explain the reasoning behind its decision as follows:

"We think that it is beyond controversy that the third prong of the *Miller* test expanded the field of potential criminal liability; indeed, the test was explicitly adopted to ease the prosecutor's burden. *Miller*, at 22, 93 S.Ct. 2607. When appellant received the film, he would have thought the act proscribed

> if he thought a jury would ultimately decide that the film was 'utterly without redeeming social value.' He could not have known that it was a crime to receive a pruriently interesting film which a jury might later determine to be lacking in 'serious literary, artistic, political or scientific value.' As appellant lacked notice of the subsequent expansion of the statute, due process fairness bars the retroactive judgment of his conduct using the expanded definition, and the conviction cannot stand." *Id.*, at 566.

The same fact situation was later presented to the Fifth Circuit in *United States v. Wasserman*, 504 F.2d 1012 (CA 5 1974). The defendants in *Wasserman* were indicted in 1972 for conduct which occurred from 1970 through 1972. Subsequent to their indictment, however, the *Miller* decision was announced and the jury in the *Wasserman* case was instructed on the obscenity definition set forth in *Miller*. In reversing the conviction, the Fifth Circuit acknowledged and expressly followed the Ninth Circuit decison in *Jacobs:*

> "Appellants' position is further supported by United States v. Jacobs (CA 9 1974) the one circuit court opinion deciding the issue of the retroactivity of *Miller*. In *Jacobs* the court held that due process fairness bars the retroactive judgment of his conduct using the expanded definition, and the conviction cannot stand. We think *Jacobs* is correct." 504 F.2d, at 1014-1015.

Precisely the same conclusion was reached by the Court of Appeals for the District of Columbia Circuit in *United States v. Sherpix, Inc.*, 512 F.2d 1361 (CA D.C. 1975). In reversing the convictions, the Court noted:

> "At the times appellants distributed and exhibited the film, they could expect to escape conviction unless a jury concluded that the film was 'utterly without redeeming social value.' Since appellants were not afforded the opportunity to conform their behavior to the law as subsequently construed, due process bars the retroactive application of *Miller* test (c), and the instant convictions must be reversed." 512 F.2d, at 1366.

In reaching this decision, the District of Columbia Circuit acknowledge and expressly followed the prior decisions of the Fifth and Ninth Circuits on the same issue:

> "The two circuits which have considered this issue have reached similar conclusions regarding the retroactivity of the *Miller* tests. See United States v. Wasserman, 504 F.2d 1012 (5th Cir. 1974); United States v. Jacobs, 513 F.2d 564 (9th Cir. 1974)." *Id.*

The majority in the Sixth Circuit decision below acknowledged in the above decisions of other Circuit Courts. As to the First Circuit decision in *Palladino, supra,* the Court below stated: "We agree with Judge Aldrich's dissent." 520 F.2d, at 922. The Court then went on to acknowledge and expressly decline to follow the decisions of the other Circuits:

> "We decline to follow Wasserman and Jacobs for the same reason that we did not follow Palladino. The time for filing in the Supreme Court petitions for certiorari, has not expired in either of these two cases." *Id.*

The conflict in the Circuits was thus expressly recognized by the majority below. It was also recognized by Judge McCree

who stated, in dissent, that he would follow the decisions in *Palladino, Jacobs, Wasserman* and *Sherpix.*

It should be noted that the majority below was incorrect in stating that the time for filing petitions for writs of certiorari had not expired in *Jacobs* or *Palladino.* As was pointed out below in the Petition for Rehearing, the time has long since expired and no petitions for certiorari have been filed by the Government in any of the cases with which the decision below conflicts.

It should also be noted that other courts, in addition to the Courts of Appeal above noted, have reached results contrary to those arrived at below. *See United States v. Lang,* 361 F. Supp. 380 (C.D. Cal. 1973); *Detco, Inc. v. McCann,* 380 F. Supp. 1366 (E.D. Wis. 1974). *See also, United States v. Cutting,* ____ F.2d ____ (CA 9 1975) (No. 71-2570 decided March 26, 1975). In *Cutting* the Ninth Circuit cited its previous decision in *Jacobs, supra,* and went on to conclude that the applicable standard on review is the community standards which prevailed at the time of the conduct charged.

The majority below gratuitously noted its view that the materials are obscene under either the *Roth -Memoirs* or the *Miller* obscenity standards. This conclusion is of suspect weight in light of the fact that "the films were not seen by any member of the panel." 520 F.2d, at 923 n.1. Moreover, the conclusion, even if properly founded, ignores the fact that the question presented deals with the propriety of *jury* instructions. Whatever the opinion of the Court of Appeals, Petitioners contend, as has been held in other Circuits, that they are entitled to have the jury instructed on the *Roth-Memoirs* formulation.

The result below is thus different than that which would obtain in the First, Fifth, Ninth, and District of Columbia Circuits. While Petitioners' convictions would have been reversed had they occurred in any of such Circuits, they stand affirmed because of the geographical accident of their occurrence within the Sixth Circuit. In order to eliminate such anomalous results, a Writ of Certiorari should be granted in order to resolve the conflict.

II.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON THE ISSUE OF WHETHER APPELLATE COURTS, IN REVIEWING OBSCENITY CONVICTIONS, MUST INDEPENDENTLY REVIEW THE MATERIALS CHARGED AS OBSCENE.

The Court of Appeals, in affirming Petitioners' convictions, failed to independently review the materials charged as obscene. This fact was documented by Judge McCree who stated, in dissent, as follows:

> "Although the challenged films were lodged with the Court as exhibits, the majority of the panel decided that an examination of them was not necessary for decision. Accordingly, the films were not seen by any member of the panel." 520 F.2d, at 923 n.1.

This course of action, however, is in conflict with a recent decision of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit, in *Clicque v. United States,* 514 F.2d

923 (CA 5 1975), spoke on this issue in a unanimous opinion authored by Judge Goldberg. *Clicque* involved an obscenity conviction founded upon a plea of guilty. Despite the guilty plea, the Court noted that the judiciary retained a duty of independent review:

> "We believe that Clicque's First Amendment rights may have been infringed and that he may have been sent to jail for protected writing. We conclude that in this constitutionally sensitive area, the convicting court was under a constitutional duty to assure itself of the unprotected nature of Clicque's writing." 514 F.2d, at 925-926.

On the status of that independent review at the appellate level, the Court noted:

> "The rule that a guilty plea does not excuse the court from reviewing the actual materials on which the plea is based applies with equal force to the district judge as it does to the appellate judge. The rule requires an 'independent assessment' of the facts before a conviction may be upheld in order to see whether the material is constitutionally protected." *Id.*, at 927.

The same point was later made as follows :

> "The requirement for the district court would seem to be the same as that for the appellate court. It must look at the materials and assess them according to the criteria given us by the Supreme Court." *Id.*, at 928 n.5.

There is thus a clear conflict among the Courts of Appeals on the issue of the necessity of an independent appellate review

of materials charged as obscene. This Court has spoken on the issue several times, always concluding that an independent review is necessary.

The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). That case involved action by a local postmaster in withholding delivery of certain magazines after finding them obscene. The publishers who had mailed the magazines brought suit in the United States District Court seeking injunctive relief, but their complaint was dismissed without opinion. The Court of Appeals affirmed the dismissal, holding that the evidence supported the administrative findings that the magazines were obscene and thus non-mailable matter.

This Court reversed in a judgment announced by Mr. Justice Harlan. The Court thought the dispositive question to be whether or not the magazines were in fact obscene. 370 U.S., at 488. On this issue, the Court noted that the determination below had been made under improper assumptions as to the law of obscenity. The Court, however, decided against remanding the case for an initial determination of the obscenity issue in a lower court:

> "Whether this question [of obscenity] be deemed one of fact or of mixed fact and law, see Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L Rev 5, 114-115 (1960), we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations." 370 U.S., at 488.

The Court decided that the determinations of that issue must ultimately rest with it:

> "That issue, involving factual matters entangled in a constitutional claim, see Grove Press, Inc. v. Christenberry (CA 2 NY) 276 F.2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves." *Id.*

The doctrine of independent review was again invoked by this Court in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). *Jacobellis* involved a conviction of a Cleveland, Ohio motion picture theatre operator for possessing and exhibiting the film "The Lovers." On appeal, this Court reversed in a judgment announced by Mr. Justice Brennan. On the issue of independent review, Mr. Justice Brennan, relying in part upon *Manual Enterprises, Inc. v. Day, supra*, stated:

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See Roth v. United States, supra, 354 U.S., at 497-498, 1 L.Ed.2d at 1541, 1515 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' *Id.*, at 498, 1 L.Ed.2d at 1514; see Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488, 8 L.Ed.2d 639, 647, 82 S.Ct. 1432 (opinion of Harlan, J.)." 378 U.S., at 188.

It was noted that the duty of appellate review is not a pleasant one, but it was held to be one which must be exercised:

> "We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by "sufficient evidence." The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." 378 U.S., at 187-188.

Mr. Justice Brennan, in an opinion joined by Mr. Justice Goldberg, went on to conclude that reversal was necessary since the film "The Lovers" was not obscene. This conclusion as to the film was concurred in by Mr. Justice Stewart.

The continuing validity of the *Jacobellis* doctrine and of the appellate duty it imposes was affirmed by this Court only recently in the case of *Jenkins v. Georgia*, 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge." This Court reversed the conviction based upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene.

This same course of independent review has been followed by this Court in several cases. *See, e.g., Kois v. Wisconsin*, 408 U S. 229 (1972); *Hamling v. United States*, 418 U.S. 87 (1974). Thus, though the Courts of Appeal are in conflict, this Court has apparently enunciated the duty of independent appellate

review of materials upon which obscenity convictions are predicated. Such considerations aside, however, the conflict of the decision below with the decision of the United States Court of Appeals for the Fifth Circuit in *Clique, supra,* is clearly in need of a resolution which only this Court can provide.

III.

THE DENIAL OF PETITIONERS' REQUESTS TO CHARGE THE JURY ON THE LOCAL COMMUNITY STANDARDS OF CINCINNATI-COVINGTON AND INSTRUCTING THE JURY ON THE COMMUNITY STANDARDS OF THE ENTIRE EASTERN DISTRICT OF KENTUCKY DEPRIVED PETITIONERS OF A FAIR TRIAL AND DUE PROCESS, CONTRARY TO THE FIRST, FIFTH, AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The District Court in this case instructed the jury on the community standards of the entire Eastern District of Kentucky. Although seemingly proper under the authority of *Miller v. California,* 413 U.S. 15 (1973), other factors in this case show that this was improper and prejudicial to the Petitioners.

Miller held that in instructing a jury regarding what appeals to the prurient interest and what is obscene, "national standards" need not be used. Although California state-wide standards were approved in that case, the Court left unclear how the abstract "local community" is to be defined. It was noted that communities may be national, state, or even more localized. They can be regional or geographic or policial.

The issue was subject to certain clarification in *Hamling v. United States,* 418 U.S. 87 (1974), where this Court seemingly approved a federal judicial district as one type of a "community." In the companion case of *Jenkins v. Georgia,* 418 U.S. 153 (1974), it was further held that instructions pertaining to a "community" are proper even without defining that community.

> "A state may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller.*" 418 U.S., at 157.

Howevermuch the above explication may seem sufficient, the nature of the "community" in the instant case defies such easy categorization. The Eastern District of Kentucky covers the entire eastern half of the state, running from Ohio on the North, to Tennessee on the South, and to West Virginia and Virginia on the East. The district comprises sixty-seven different counties; the cities of Covington, Newport, Ashland, Frankfurt, and Lexington; urban areas in and around these cities; and the country, hill areas of the Cumberland Mountains and Appalachia. The jury panel in the instant case was drawn only from the metropolitan Covington area. It was nevertheless instructed by the District Court on the "standards" of the "community" of the Eastern District of Kentucky.

It must be noted that at least half the jurors sitting in judgment on this case, although living in the Covington area, worked across the Ohio River in Cincinnati, Ohio. Covington is a city of over 60,000; Cincinnati's population exceeds one-half million. The jury was thus a group all living in one city

with one-half working in another city. This group was instructed, over Petitioners' objections, on the "community standards" of a community excluding the area where many worked and including an area where none lived.

Justice Rehnquist, in announcing the Court's decision in *Hamling, supra,* stated:

> "A juror is entitled to draw on his *own* knowledge of the views of the average person *in the community or vicinage from which he comes* for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law.
>
> * * * * *
>
> "The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge *of the community or vicinage from which he comes* in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." 418 U.S., at 104-105 (emphasis added).

To define "community" in this case by the precise political-geographic boundary of the Eastern District of Kentucky, does violence to the constitutional percepts of due process and the right to a fair trial.

Jurors who live in one city and work across the river in another city cannot arbitrarily limit their exposure to "standards" or attitudes by a line drawn and determined by the flow of a river. They are necessarily affected by the atmosphere

that pervades the city within which they work every day. The "vicinage" of the jurors that this Court has said may be drawn upon encompasses the *actual* community from which they come, not some artificial political boundary. This is especially true when a juror comes from a city of 60,000 that is really only an extension of a much larger city of one-half million with which it shares a common boundary. The necessary influence the larger city exerts upon the lesser city is inescapable. Similar situations exist anytime there are sister cities, such as Minneapolis/St. Paul; Philadelphia, Pa./Camden, N.J.; Boston/Cambridge; St. Louis, Mo./East St. Louis, Ill.; and Washington, D.C./Arlington, Va.

A community does not arbitrarily stop at a political boundary, and it is unreasonable for jurors to assess a material's social acceptability in a community when most of that community is excised from their consideration. It is surely a denial of Petitioners' rights to a fair trial and due process of law when a jury familiar with the standards of Cincinnati-Covington, judging material distributed in that area, is instructed to consider standards not of that community, but of an artificial, political one including Appalachia, hundreds of miles away.

The Court in *Miller* approved Chief Justice Warren's dissent in *Jacobellis* where he stated:

> "[W]hen the Court said in *Roth* that obscenity is to be defined by reference to 'community standards', it meant community standards – not a national standard, as it is sometimes argued. I believe that here is no provable 'national standard', and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It

> is said that such a 'community' approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. *But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals."* 378 U.S. at 200-201 (emphasis added).

This Court in *Miller* rejected "national" standards as unascertainable, unworkable, and "an exercise in futility." The Eastern District of Kentucky is as diverse as any large region. Tastes and social acceptability may differ widely from the hills of Appalachia to the streets of Covington.

In discussing the meaning of the term "community," the Fifth Circuit Court of Appeals in *United States v. Groner,* 479 F.2d 577 (CA 5 1973), said:

> "For the trial of obscenity cases under federal law 'the community' should logically embrace that area from which the jury is drawn and selected. According to the Jury Act federal juries are generally drawn from a division within a district or from the district at large. Depending upon the population involved these districts vary greatly in geographical area. In a few cases a district is as large as a state; but in metropolitan areas the boundaries of a district may be comparatively small, though in such districts the population is varied and large. It does not seem reasonable or sensible to require a jury in federal criminal obscenity cases drawn from a single district or division to assess the thinking of the average person of the community, to consider the common

> conscience of the community, or the present-day standards of the community if the work 'community' is to include all of the people within the boundaries of this vast Nation North, South, East and West." 479 F.2d, at 583.

Similarly, when there is as large and diverse an area as the Eastern District of Kentucky, it becomes impossible for a jury to assess the standards of the entire district.

Hamling held that jurors may draw upon their own vicinage for experiences and knowledge upon which to base a decision of whether or not materials contravene local community standards. The Court below, however, refused to admit and give instructions concerning the local community standards of Cincinnati-Covington, and even the street upon which the theatre itself was located. Thus the community directly concerned with this case was not the focus of the instructions but rather a community that is best termed abstract, unworkable, and unascertainable. The only evidence the Court below admitted concerning Cincinnati was the movement of some of the Appellants there and possibly the presence of film there. Evidence as to the standards of Cincinnati-Covington was not admitted, and even if it had been admitted, it was not instructed upon by the Court. It must be remembered that a number of the jurors in this case worked across the river in Cincinnati and could not escape its influence upon their decisions. They were forced, however, to disregard such experiences, to disregard the vicinage from which they came, a concept upheld in *Hamling,* and told by the Court to use standards for which they were most likely unfamiliar.

Because the jury here was drawn from the Covington area, because half of them worked in Cincinnati, because the local

community referred to by the trial court excised all references to Cincinnati-Covington as a community, and because the trial court instructed the jury regarding the "standards" of the entire Eastern District of Kentucky, rather than the actual community or vicinage, Petitioners were denied a fair trial and due process of law.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

**UNITED STATES of America,
Plaintiff-Appellee,
v.
Stanley MARKS, d/b/a Cinema X
Theatre, Defendant-Appellant.**

**UNITED STATES of America,
Plaintiff-Appellee,
v.
AMERICAN AMUSEMENT COMPANY, INC.,
Defendant-Appellant.**

**UNITED STATES of America,
Plaintiff-Appellee,
v.
Guy WEIR, Defendant-Appellant.**

**UNITED STATES of America,
Plaintiff-Appellee,
v.
Harry MOHNEY, Defendant-Appellant.**

**UNITED STATES of America,
Plaintiff-Appellee,
v.
AMERICAN NEWS COMPANY, INC.,
a/k/a American News Distributing
Co., Defendant-Appellant.**

Nos. 74-1531 to 74-1535.

**United States Court of Appeals,
Sixth Circuit.**

July 30, 1975.

Before WEICK, McCREE and ENGEL, Circuit Judges.

WEICK, Circuit Judge.

The defendants were charged in a nine-count indictment with eight substantive offenses of transporting in interstate commerce from various states to Newport, Kentucky, copies of obscene, lewd, lascivious and filthy films and film previews for the purpose of sale and distribution, in violation of 18 U.S.C. § 1465, and in the ninth count with a conspiracy in violation of 18 U.S.C. § 371.

All of the defendants were acquitted by the jury of the charge contained in Count 8 of the indictment, which count involved the film preview "Let Me Count the Lays." American News Company, Inc. was convicted only on the conspiracy Count 9. The remaining defendants were convicted on Counts 1 through 7 and Count 9. The individual defendants were each given concurrent sentences of three months' imprisonment and fined $2,000. American News was fined $5,000, and American Amusement was fined $7,000.

Each alleged obscene film or film preview was made the subject of a separate count in the indictment. The films involved in Counts 1 through 7 of the indictment were "Deep Throat" and "Swing High". The film previews were "Doctor's Disciples," "Teenage Cowgirls," "Black On White," "Memoirs of a Madam," and "A Few Bucks More."

The films had been viewed at Cinema X Theatre in Newport, Kentucky, by Special Agent Glossup of the FBI, another agent, and an Assistant United States Attorney, who paid for their admissions to the theatre. A few days later Special Agent Aebly viewed the film "Swing High" and the film preview "Doctor's Disciples" at the theatre.

Special Agent Glossup had made an investigation and learned that Cinema X was regularly receiving shipments in interstate commerce and had received interstate shipments shortly prior to the showing of the film and previews at the

theatre. He also found out that the film "Deep Throat" had been made outside of Kentucky.

Special Agents Glossup and Aebly then executed separate Affidavits for a Search Warrant, to search the premises of Cinema X Theatre in Newport. The affidavit of Special Agent Glossup set forth in great detail the facts as to what each film or film preview depicted and exhibited, and also the narration.[1]

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[1] A composite of all of the films and film previews depict acts of cunnilingus, fellatio, onanism, sodomy, male ejaculation, sexual intercourse and group sex.

Deep Throat: portrayed a young female in quest of sexual fulfillment, which had eluded her because her clitoris was lodged in her throat. Scenes depicted males and females engaged in cunnilingus, sodomy, group sexual encounters where sodomy and fellatio were simultaneously practiced, sexual intercourse, and male ejaculation.

Swing High: depicted a group sexual encounter where cunnilingus, fellatio, sexual intercourse, masturbation, onanism, and sodomy were practiced.

Previews

Doctor's Disciples: depicted acts of onanism, sexual intercourse, and male ejaculation.

Teenage Cowgirls: two very young females are shown in close up scenes of fellatio and sexual intercourse.

Black on White: depicted various acts of fellatio, cunnilingus and sexual intercourse by a white male with a black female and a black male with a white female.

Memoirs of a Madam: portrayed three couples on a bed in various stages of nudity engaging in oral and genital acts, and with one female masturbating with a vibrator. This preview also depicted a black male and white female engaged in sexual intercourse.

A Few Bucks More: portrayed fellatio, and male enjaculation.

The affidavit of Glossup also stated that the films had been transported in interstate commerce.

The affidavit of Special Agent Aebly referred to Glossup's "companion" affidavit and stated that the films which he viewed were a violation of 18 U.S.C. § 1465 and provided an objective narrative of "Swing High" and "Doctor's Disciples."

The Government applied to a United States Magistrate for a search warrant based on the two affidavits and requested that the Magistrate set the time for a hearing on the issue of obscenity *vel non*. The Government also applied to the District Court for a temporary restraining order to prevent the removal or destruction of the films pending the obscenity hearing before the Magistrate, which application was granted. Copies of the restraining order and notice of hearing before the Magistrate were served on the individual then in charge of Cinema X.

A motion to dismiss was filed by appellant, Stanley Marks, doing business as Cinema X Theatre, and it was denied by the District Judge.

The Magistrate conducted a hearing on the issue of obscenity. Special Agents Glossup and Aebly testified and were cross-examined and their affidavits were admitted in evidence. Near the conclusion of the hearing Mr. Marks asked for a continuance to present expert testimony on the issue of obscenity, which request was denied, and the search warrant was issued. The record does not reveal any effort by the appellant Marks to present the films to the Magistrate to aid him in making his determination of obscenity.

A search of the premises of Cinema X Theatre was conducted. The films and film previews which are the subjects of the indictment were seized along with advertising displays and time schedules.

A motion to suppress was made and was denied.

I.

[1] In our opinion there was probable cause for the Magistrate to issue the search warrant. The action of the Magistrate in issuing the search warrant was supported by the affidavits of Special Agents Glossup and Aebly. These affidavits clearly indicated that the films involved hard core pornography of the worst sort.

The showing of the film was not protected by the First Amendment. It was not required that the Magistrate view the films. He could accept the sworn statements of the two Special Agents which graphically portrayed the films as well as the sound features. The Special Agents were also examined and cross-examined at the hearing.

If Mr. Marks desired to offer expert testimony on the obscenity issue he should have presented his witnesses at the hearing and not asked for a continuance, which the Magistrate was not bound to grant. We find no abuse of discretion on the part of the Magistrate.

[2] Nor do we find any error on the part of the District Court in granting a temporary restraining order without notice to appellants, which injunction was granted for the sole purpose of preventing the destruction or removal of the films and thereby preserving the status quo. *United States v. Little Beaver Theatre, Inc.*, 324 F. Supp. 120 (S.D. Fla. 1971).

[3] The affidavit of Agent Glossup also was sufficient to establish that the films had been transported in interstate commerce.

The District Court was correct in denying the motion to suppress.

II

[4] In our opinion the provisions of 18 U.S.C. § 1465 are not vague nor overbroad. The statute is constitutional. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). *United States v. 12 200-ft. Reels of Super 8MM Film*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973); *Smith v. United States*, 505 F.2d 824 (6th Cir. 1974); *United States v. Hill*, 500 F.2d 733 (5th Cir. 1974); *United States v. Manarite*, 448 F.2d 583 (2nd Cir. 1971), *cert. denied*, 404 U.S. 947, 92 S.Ct. 281, 30 L.Ed. 2d 264 (1971).

III

In arguing that there was no proof of conspiracy, the appellants assert that it was necessary to prove that they had actual knowledge that the films were obscene under the law. We disagree.

[5] The scienter required to support their conviction, however, was not that they actually knew that the films were obscene under legal standards, but only that they knew the general nature and character of the films. *Rosen v. United States*, 161 U.S. 29, 41, 42, 16 S. Ct. 434, 40 L.Ed. 606 (1896). This was made explicit in *United States v. Hamling*, 481 F.2d 307 (9th Cir. 1973), *aff'd*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); *United States v. Mishkin*, 317 F.2d 634, 637 (2d Cir. 1963), *cert. denied*, 375 U.S. 827, 84 S. Ct. 71, 11 L.Ed.2d 60 (1963).

[6] It was not necessary that the films be judicially determined to be obscene before any conspiracy to violate Section 1465 could exist.

[7] In our opinion there was substantial evidence to support the conviction of the appellants on the conspiracy count.

IV

[8] The use of a multi-count indictment was not unconstitutional, and no case cited by appellants so holds. Each count of the indictment charges a separate and distinct offense. The criteria to establish each offense is different.

What appellants are really complaining about is that the proof did not show that each film or film preview was shipped in interstate commerce on a day certain. The indictment alleged that "Deep Throat" was shipped between the dates of January 24 and January 31, 1973; that "Swing High" was shipped between February 1 and February 27, 1973; that the remaining shipments were made between January 15 and February 27, 1973. The exact dates of these shipments could not very well be proven by the Government because Cinema X had destroyed its records of the shipments.

[9] In our opinion the transportation of each film or or film preview constituted a separate offense. *United States v. Bennett*, 383 F.2d 398 (6th Cir. 1967). See also *Sanders v. United States*, 441 F.2d 412 (10th Cir. 1971).

The proof established that Cinema X was receiving shipments from different states.

There was some evidence that "Deep Throat" was filmed in New York and Florida.

The conspiracy would also constitute an offense separate from the substantive offenses.

In any event, there could be no prejudice to the appellants because the sentences on all the counts were made concurrent.

V

[10] The District Court did not err in denying the motion of the defendants to voir dire the jury to determine whether they heard all of the film dialogue of "Deep Throat" shown in the courtroom.

Their first motion was addressed to whether the jury could hear and "understand" the dialogue, but later defendants dropped the "understand" part.

The District Court said:

THE COURT: Very well. I overrule your motion. I heard the dialogue, I saw the picture. I can't say I understood the dialogue in its greatest detail, but I understood it well enough to get the sense of the picture as these experts all of them the defendant's, outlined it. [Tr. 643]

The Court further stated:

THE COURT: Well now, I think to ask them if they understood–

MR. DENNISON: That is could they hear it.

THE COURT: –and heard the complete dialgoue is an extreme situation. I'm not sure there is any trial in any case that the jury has to go on record as saying, "I understand completely everything that has gone on in this case."

MR. DENNISON: No, Your Honor, I didn't mean to confuse the Court by the term "understand". Rather what I meant to say, if I did use the term "understand" was that they could hear it, was it audible to them.

THE COURT: Well, I'll have to exercise my own conclusions as to if it was addressing itself to the jury as it did to me and I could see it, hear it, and understand it and I must assume that the jury could. I'm not saying it was the most perfect showing, not the same as you would get on a large screen, or that the accoustics in this courtroom are the same as they are in a theater, but I think it was sufficient to understand it. In addition to that it was explained in detail by the expert witnesses. I think the jury has had ample disclosure of the film's plot, its purpose, and I will overrule your motion. [Tr. 644-645]

It appears from the foregoing that the District Judge was able to see, hear, as well as understand the "Deep Throat" dialogue. In addition, the dialogue was discussed in the testimony of the defendants' experts, so that the jury knew all about it.

It was not contended that the jurors did not get a good view of the pictures shown on the film which portrayed obscenity at its worst.

Nor did the defendants point out what portions, if any, of the sound track of the film were inaudible, or offer to provide one of their better films.

No issue was raised as to the viewing of the film previews.

This issue was addressed to the sound discretion of the District Court which saw the film and heard the dialogue.

We find no abuse of discretion.

VI

Appellants contend that they were deprived of their right to a fair trial and due process rights when the District Judge instructed the jury that the contemporary community standards would be comprised of the Eastern District of Kentucky, as opposed to the national standard, or even the Cincinnati-Covington area. Appellants assert that "community" should not have been defined by the precise political-geographic boundary of the Eastern District of Kentucky. We disagree.

[11] The jury was composed entirely of residents of the Eastern District of Kentucky. The Cinema X Theatre was located in Newport, Kentucky, a city within the Eastern District. In addition, the District Judge permitted testimony with respect to the community standards of the Cincinnati area, although Cincinnati is in a different state.

In *Miller v. California, supra,* 413 U.S. at 33-34, 93 S.Ct. 2607, the entire state of California was found a proper focal point for determining community standards.

In *Hamling v. United States,* 418 U.S. 87, 94 S. Ct. 2887, 41 L.Ed.2d 590 (decided June 24, 1974), the Supreme Court defined a "community" for federal obscenity cases as follows:

Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that "'community" upon which the jurors would draw. But this is not to say that a District Court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jury. . . .
(*Id.* at 105, 94 S.Ct. at 2901).

See *Jenkins v. Georgia,* 418 U.S. 153, 94 S. Ct. 2750, 41 L.Ed.2d 642 (1974).

We conclude that the District Judge could properly limit the community standard to the area encompassed by the Eastern District of Kentucky.

VII

Finally, it is contended that the District Court erred in its instructions to the jury by applying the standards in the most recent decisions of the Supreme Court in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and companion cases.[2]

Appellants assert that since the offenses of which they were convicted were committed prior to the *Miller* and companion decisions, they were entitled to the protection of the *Roth-Memoirs* definition of obscenity. *Roth v. United States,* 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957); *Memoirs v. Massachusetts,* 383 U.S. 413, 86 S. Ct. 975, 16 L.Ed.2d 1 (1966). They contend that the *Miller* formulation as to obscenity as applied to their pre-*Miller* offenses constituted an *ex post facto* law and violated their constitutional rights to due process of law and a fair trial.

Roth held specifically that obscene material is not protected by the First Amendment. *Id.* 354 U.S. 485, 77 S.

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[2] *Miller v. California,* 1973, 413 U.S. 15, 27, 93 S.Ct. 2607, 2616, 37 L.Ed.2d 419, 432; *Paris Adult Theatre I v. Slaton,* 1973, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446; *United States v. Orito,* 1973, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513; *Kaplan v. California,* 1973, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492; *United States v. 12 200-Ft. Reels of Super 8 mm Films,* 1973, 413 U.S. 123, 93 S. Ct. 2665, 37 L.Ed.2d 500.

Ct. 1304. This was also the theme of *Miller* and companion cases.

The *Roth-Memoirs* formulation provided that in order to be obscene.–

(a) The dominant theme of the material taken as a whole appeals to a prurient interest in sex;

(b) The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters;

(c) The material is utterly without redeeming social value.

The *Miller* formula changed only (c) in the *Roth-Memoirs* definition so that it would read as follows:

(c) Whether the work taken as a whole lacks serious literary, artistic, political or scientific value.

Chief Justice Burger, who wrote the opinion for the majority in *Miller*, stated the reasons for the change in the definition. In the first place, the *Roth-Memoirs* definition (c) had never been approved by a plurality of more than three Justices at any one time. It imposed a burden virtually impossible to discharge under our criminal standards of proof.

Mr. Justice Harlan, in his dissent in *Memoirs*, wondered whether formulation (c) had any meaning at all. *Id.*, 383 U.S. 459, 86 S.Ct. 975.

It is plain to us that the material in the present case was obscene, irrespective of which standards are applied.

Examples of obscene matter were given in *Miller*:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. (*Id.*, 413 U.S. 25, 93 S.Ct. 2615)

The brochures found to be obscene in *Miller* "consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals, often prominently displayed." (*Id.* 18, 93 S.Ct. 2612).

Appellants assert–

. . . [P]rior to *Miller* only a modicum of social value need be shown for a film to be non-obscene.[3]

We disagree.

"Modicum" is defined in Webster's New American Dictionary of the American Language, College Edition, as "a small amount in portion, bit."

If this were the law then an obscene film could be insulated and made nonobscene by a narrative which quoted only a single sentence from the Bible.

Under the *Roth-Memoirs* standards it was always necessary for the Government to prove that the *dominant* theme (not *modicum)* appealed to the prurient interest in sex in order to be obscene.

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[3] Chief Justice Burger, in *Miller*, was of the view that it was easier to apply the relaxed standards in *Miller*, rather than the more stringent standards of *Roth-Memoirs*.

As well stated by Chief Justice Warren, in his concurring opinion in *Roth*, 354 U.S. at 496, 77 S. Ct. at 1315:

They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. . . . That is all that these cases present to us, and that is all we need to decide.

Libelous material does not become nonlibelous merely because it is accompanied by a modicum of nonlibelous matter.

[12] The defendants were entitled to any benefit they could derive from *Miller* and companion cases. *Hamling v. United States, supra; Jenkins v. Georgia, supra.*

There can be no question but that the material in "Deep Throat" was hard core pornography. It was the type referred to by Mr. Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184, at 197, 84 S.Ct. 1676, at 1683, 12 L.Ed.2d 793 (1964), when he stated we "know it when [we] see it." The jury saw it when it reviewed the film and had no difficulty in assessing its character.

The case was tried before one of our ablest District Judges, the late Mac Swinford, who applied the *Miller* formulation. We believe he was required to do so by the specific terms of the remand in *Miller*, which was "for further proceedings not inconsistent with First Amendment standards as established by this opinion. See *United States v. 12 200-Ft. Reels of Film*, post [413 U.S.] 130 n.7 [93 S.Ct. 2665.]" Note 7 reads:

. . .We are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of "hard core" sexual conduct given as examples in *Miller v. California, supra* [413 U.S.] at 25 [93 S.Ct. 2607]. See *United States v. 37 Photographs, supra* [402 U.S. (363)] at 369-374 [91 S.Ct. [1400] at 1404-1407, 28 L.Ed.2d 822] (White, J.)

In *United States v. 12 200-Ft. Reels of Super 8MM Film*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), decided with *Miller*, the Court said:

We have today arrived at standards for testing the constitutionality of state legislation regulating obscenity. See *Miller v. California, supra* [413 U.S.] at 23-25, 93 S.Ct. [2607], at 2614-2615. These standards are applicable to federal legislation. *Id.*, at 129-130, 93 S.Ct. at 2671.

This issue, we think, is governed by the decision of the Supreme Court in *Hamling v. United States, supra.* In that case the District Court, *pre-Miller*, instructed the jury that the case was governed by the national standards for obscenity. On appeal, appellants contended that they were entitled to the benefit of *Miller*, namely that contemporary community standards should have been applied. In *Hamling* the Court held, 418 U.S. at 108, 94 S.Ct. at 2903:

. . .[W]e hold that reversal is required only where there is a probability that the excision of the references to the "country as a whole" in the instruction dealing with community standards would have materially affected the deliberations of the jury. [Citing authority]. . . Our examination of the record convinces us that such a probability does not exist in this case.

[13] Our examination of the record in the present appeals convinces us that such a probability does not exist here, for it is clear that under either *Roth-Memoirs* or *Miller* standards the material was obscene.

The Court further stated in *Hamling* at 115, 94 S.Ct. at 2906:

Nor do we find merit in petitioners' contention that cases such as *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), require reversal of

their convictions. The Court in *Bouie* held that since the crime for which the petitioners there stood convicted was "not enumerated in the statute" at the time of their conduct, their conviction could not be sustained. *Id.*, at 363, 84 S.Ct. [1697], at 1707. The Court noted that "a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." 378 U.S. at 352, 84 S.Ct. [1697], at 1702. But the enumeration of specific categories of material in *Miller* which might be found obscene did not purport to make criminal, for the purpose of 18 U.S.C. § 1461, conduct which had not previously been thought criminal. That requirement instead added a "clarifying gloss" to the prior construction and therefore made the meaning of the federal statute involved here "more definite" in its application to federal obscenity prosecutions. *Bouie v. City of Columbia*, 378 U.S. at 353, 84 S.Ct. [1697], at 1702. Judged by both the judicial construction of § 1461 prior to *Miller*, and by the construction of that section which we adopt today in the light of *Miller*, petitioners' claims of vagueness and lack of fair notice as to the proscription of the material which they were distributing must fail.

Defendants rely on *United States v. Palladino*, 490 F.2d 499 (1st Cir. 1974). The judgment in the first appeal in *Palladino* had been vacated and remanded by the Supreme Court to the Court of Appeals for consideration in the light of *Miller* and companion cases.

On the remand a divided Court of Appeals held that national and obscenity standards under *Roth-Memoirs* were to be applied rather than the community and obscenity standards under *Miller*. Senior Circuit Judge Bailey Aldrich dissented, stating in part:

I am not happy about the court's opinion. In the first place, the Court majority in *Miller* evinced no compunction about convicting Miller by a definition of obscenity that was

not in effect at the time of his publication. Having in mind the mass of uncertainties in this field, see my prior dissent, I can see why the Court felt that the First Amendment did not bar an adverse change in the rules. If not for Miller, why for Palladino? This case does not fit the normal situation where the courts have had to determine whether constitutional principals are to be applied retroactively. With all respect, I do find the Fifth Circuit's decision in *United States v. Thevis* [484 F.2d 1149] persuasive. The Court sent this case back to determine "in light of *Miller* . . ."*

*The Fifth Circuit's First Amendment ruling was a bare assertion, and got off, I suggest, somewhat on the wront foot by misquoting the mandate as remanding for further proceedings "not inconsistent with" *Miller*, etc., rather than "in light of." (490 F.2d at 504)

and I would apply the *Miller* definition, not *Roth's* or *Memoirs'*.

By the same token, we are not required by past decisions to give the defendant the benefit of national standards. Today, as a modest observer, I believe that national standards is a many-headed hydra, only ingenuously to be spoken of as within the competence of any expert short of Hercules, and beyond the mastery of any juror.

We agree with Judge Aldrich's dissent. We note that in *Hamling, supra, Palladino* was rejected by the Supreme Court in its holding that national rather than community standards should be applied.

In *United States v. Wasserman*, 504 F.2d 1012 (5th Cir. 1974), the Court reversed because *Miller* standards were applied, citing *Palladino*, its previous decision in *United States v. Thevis*, 484 F.2d 1149 (5th Cir. 1973), *cert. denied* 418 U.S. 932, 94 S.Ct. 3222, 41 L.Ed.2d 1170 (1974), and *United*

States v. Jacobs, 513 F.2d 564 (9th Cir. 1974) as authority. Jacobs cited the Fifth Circuit decision in *Thevis*.

Thevis was pending on appeal when *Miller* and companion cases were decided. The Court of Appeals considered obscene standards under both *Memoirs* and *Miller*, and held that any count of the indictment based on a magazine which is not obscene under both standards would be dismissed. We do not regard *Thevis* as applicable.

We decline to follow *Wasserman* and *Jacobs* for the same reason that we do not follow *Palladino*. The time for filing in the Supreme Court petitions for certiorari, has not expired in either of these two cases.

We are of the opinion that under either *Memoirs* or *Miller* standards the films in the present appeals were obscene.

In our opinion the verdicts of the jury were supported by substantial evidence, and no prejudicial error intervened at the trial.

Affirmed.

McCREE, Circuit Judge (dissenting).

I respectfully dissent. Appellants contend that their convictions under 18 U.S.C. §§ 371, 1465 should be reversed because the district judge erroneously gave a *Miller* instruction. They contend that the issue whether the films are obscene should have been decided under the *Roth-Memoirs* standard because the films were seized before the Supreme Court decided *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Three circuits have considered the same issue and have determined that *Miller* expanded the field of potential criminal liability and that it would be unfair to hold defendants' conduct criminal by a retroactive application of *Miller*. See *United States v. Jacobs*, 513 F.2d 564 (9th Cir. 1974), *United States v. Sherpix*, 512 F.2d 1361 (D.C.Cir. 1975) (cases holding that

Miller instruction for pre-*Miller* conduct was a denial of due process), and *United States v. Wasserman*, 504 F.2d 1012 (5th Cir. 1974) (retro-active application of *Miller* is inappropriate without substantial justification outweighing *ex post facto* considerations).

The majority opinion holds that the films in question are obscene under either the *Roth-Memoirs* formula or the *Miller* formula and it accordingly does not reach the issue whether *Miller* is an appropriate standard. If the jury had been given both the *Miller* and the *Roth-Memoirs* instructions, we could view the films and determine whether the jury's verdict that they were obscene was permissible. *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974). However, since the jury was not given the *Roth-Memoirs* instruction ("utterly without redeeming social value"), to speculate on our view [1] of the films how the jury might have decided the case if it had been given the proper instructions would deny the right of trial by jury. I agree with the opinions rendered by unanimous panels in the District of Columbia, the Fifth, and the Ninth Circuits holding the retroactive application of *Miller* to be improper. I would reverse the convictions.

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[1] Although the challenged films were lodged with the court as exhibits, the majority of the panel decided that an examination of them was not necessary for decision. Accordingly, the films were not seen by any member of the panel.

APPENDIX B

Constitutional and Statutory Provisions.

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law . . . abridging the freedom of speech, or of the press. . ."

2. The pertinent provisions of the Fifth Amendment are:

   "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."